MARCHETTI, FEDERAL REGISTRATION AND THE FIFTH AMENDMENT

James Marchetti was convicted in a Federal District Court in Connecticut for willfully failing to comply with the federal gambler registration statute.[1] The district court also found Marchetti guilty of a conspiracy to evade payment of a fifty dollar occupational tax imposed on all persons engaged in the business of gambling.[2] Throughout the proceedings and after the trial, in an arrest of judgment motion, Marchetti asserted that the statutory system which required him to pay the occupational tax violated his fifth amendment privilege against self-incrimination. The Second Circuit Court of Appeals affirmed the decision of the district court.[3]

In *Marchetti v. United States*,[4] the Supreme Court held that the privilege against self-incrimination should have provided a complete defense to the prosecution of the petitioner. The Supreme Court, in its grant of certiorari, had limited the issues raised by this case to a consideration of whether the fifth amendment was a constitutional bar to the particular provisions of the wager tax statutes.[5] In decid-

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1 Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) . . . each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf. . . .

INT. REV. CODE of 1954, § 4412.

2 There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401. . . .

INT. REV. CODE OF 1954, § 4411. The persons liable for the tax shall pay a 10 percent excise tax, INT. REV. CODE of 1954, § 4401(a), and

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax . . . on all wagers placed with him. . . .

INT. REV. CODE of 1954, § 4401(c).

3 United States v. Marchetti, 352 F.2d 848 (2d Cir. 1965). On affirming the conviction, the Court of Appeals relied on the authority of United States v. Kahriger, 345 U.S. 22 (1953) and Lewis v. United States, 348 U.S. 419 (1955).

4 390 U.S. 39 (1968).

5 385 U.S. 1000 (1967):

Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this Court, especially in view of its recent decision in *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), overrule *United States v. Kahriger*, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955)?

After argument, the Court requested reargument, 388 U.S. 903 (1967), on the above question and also on the questions of:

ing that the privilege was a bar, the Court overruled two cases of long-standing precedent, *United States v. Kahriger*[6] and *Lewis v. United States*.[7] These cases had held that the taxing provisions were not violative of the fifth amendment privilege against self-incrimination. The Court in *Marchetti* held that while the wagering tax provisions are not unconstitutional, it being well recognized that Congress may tax illegal activities, those who properly assert the constitutional privilege against self-incrimination may not be criminally punished for failure to comply with those requirements.[8]

In a companion case, *Grosso v. United States*,[9] the Court further developed the position it took in *Marchetti*. Grosso, who was tried in a federal district court in Pennsylvania, was found guilty on fifteen counts of willful failure to pay the ten percent excise tax imposed on wagers[10] and four counts of willful failure to pay the occupational tax.[11] Grosso was also convicted on one count of conspiracy to defraud the United States Government by not paying the above taxes.[12] Grosso defended the prosecution by asserting that payment of the excise tax would require him to incriminate himself. The Third Circuit Court of Appeals affirmed the conviction[13] and the Supreme Court granted certiorari on the same limited issues that were to be decided in *Marchetti*.[14]

Using the *Marchetti* reasoning, the Court found the act of paying the excise tax and requirement to pay the occupational tax violative of the privilege against self-incrimination. The Court recognized that there is no statutory mandate that the internal revenue officers provide state and local prosecutors with lists of those people

(1) What relevance, if any, has the required records doctrine, *Shapiro v. United States*, 335 U.S. 1, to the validity under the Fifth Amendment of the registration and special occupational tax requirements of 26 U.S.C. §§ 4411, 4412?

(2) Can an obligation to pay the special occupational tax required by 26 U.S.C. § 4411 be satisfied without filing the registration statement provided for by 26 U.S.C. § 4412?

6 345 U.S. 22 (1953).

7 348 U.S. 419 (1955).

8 Marchetti v. United States, 390 U.S. 39, 60 (1968).

9 390 U.S. 62 (1968).

10 There shall be imposed on wagers . . . an excise tax equal to 10 percent of the amount thereof.

INT. REV. CODE of 1954, § 4401(a).

11 INT. REV. CODE of 1954, § 4411; text set out *supra* note 2.

12 18 U.S.C. § 371 (1964).

13 United States v. Grosso, 358 F.2d 154 (3d Cir. 1966).

14 385 U.S. 810 (1966); for a text of the grant of certiorari, see *supra* note 5.

who have paid the excise tax,[15] but it was also recognized that the Revenue Service has taken it upon itself to make such lists available. Because of this situation, the Court felt that there was a genuine hazard of incrimination, *i.e.*, a real and definite possibility that people complying with the statutes would be prosecuted.

It should be noted that Marchetti was convicted for failure to register as a gambler, and Grosso was convicted for failure to pay the excise tax. The Court is not saying that the act of paying the tax is incriminating. It is recognizing that, in order to pay the ten per cent excise tax, it is necessary that the taxpayer also fill out and file the appropriate registration forms.[16] Thus, Grosso is unable to satisfy his duty to pay the excise tax without also incriminating himself or increasing his chances of prosecution. He cannot merely tender the taxes due, he must also file the appropriate registration forms.

The Court in *Grosso*, as it did in *Marchetti*, held that, under the factual situations presented by these cases, the doctrine of required records is not applicable.[17]

In *Haynes v. United States*,[18] there is an extension of the rationale developed in *Marchetti* and *Grosso* to a different type of registration requirement. The petitioner was convicted for violating a statute which requires that a person may not knowingly own or possess a firearm which has not been registered with the Secretary of the Treasury or his delegate as required by the statute.[19] The Fifth Circuit Court of Appeals affirmed Haynes' conviction.[20]

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15 There is a statutory mandate to publish a list of all people registering and paying the fifty dollar occupational tax. Thus, in *Marchetti*, there was a possibility of publication if petitioner registered and paid the tax. INT. REV. CODE of 1954, § 6107, requires that a list of special taxpayers be kept for public inspection.

16 This is generally recognized to be the correct procedure; see the arguments made by the government and the petitioners. *See* INT. REV. CODE of 1954, § 6011.

17 390 U.S. at 56, and 390 U.S. at 67. A definition and discussion of the required records doctrine will be found in text accompanying notes 59 & 60 *infra*.

18 390 U.S. 85 (1968).

19 The relevant provisions of the INTERNAL REVENUE CODE OF 1954 are:

§ 5851:

> It shall be unlawful for any person to receive . . . or to possess any firearm which has not been registered as required by section 5841.

§ 5841:

> Every person possessing a firearm shall register, with the Secretary or his delegate, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment.

§ 5848(1):

Citing *Marchetti*, the Court in *Haynes* held that the failure to register is an offense subject to the defense of the privilege against self-incrimination.[21] There is, as stated by the Court, a real and appreciable hazard of incrimination in the requirement to register, because the obligation to register is based entirely upon possession of specific types of firearms defined by the statute. The specific types of firearms which must be registered are the types usually used by people "inherently suspected of criminal activities."[22] The Court recognized a high correlation between the duty to register and prosecutions. The registration requirement works a substantial increase in the likelihood of prosecution.[23]

In declaring that the assertion of the privilege is a valid defense to a prosecution under the registration acts, the Court, as it did in *Marchetti* and *Grosso*, recognized that Congress has full power to impose taxes. Congress may even impose taxes on essentially illegal activities. It is understood that the principal interest of the United States is the collection of revenue and not the prosecution of the people committing the illegal activity.[24] These statements by the Court constitute a recognition that (1) the statutes are valid revenue measures and (2) that deference must be given to the Congressional power to tax; but there is also the recognition that the Court is obligated to heed the limitations placed on that power by other provisions of the Constitution.

The term "firearm" means a shotgun having a barrel or barrels of less than 18 inches in length, or a rifle having a barrel or barrels of less than 16 inches in length, or any weapon made from a rifle or shotgun . . . if such weapon as modified has an overall length of less than 26 inches, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition.

20 Haynes v. United States, 372 F.2d 651 (5th Cir. 1967).

21 The Court felt that a prosecution under § 5851 was not properly distinguishable from a prosecution under § 5841. The government had claimed that these were two entirely distinct offenses: § 5851 was intended to punish acceptance of a firearm which was never registered pursuant to the requirements of § 5841; and, § 5841 was intended to punish the possessor who fails to register the fact of his own possession. In spite of the government's argument, the Court felt that a conviction under § 5851 is not properly distinguishable from a conviction under § 5841. Haynes v. United States, 390 U.S. 85, 93-95 (1968).

22 *Id.* at 96.

23 *Id.* at 97.

24 Marchetti v. United States, 390 U.S. 39, 44 (1968); Grosso v. United States, 390 U.S. 62, 68 (1968); Haynes v. United States, 390 U.S. 85, 90 (1968).

In all these cases, *Marchetti, Grosso,* and *Haynes,* there is a rejection of a government proposal that if the statutes are violative of the constitutional privilege against self-incrimination, the Court should impose some form of use-restriction (an immunity from prosecution) rather than declare the statute unconstitutional.[25] The government contended that unless the "use-restriction" is imposed, the statutes would be of little value. It was the government's contention that it makes no sense to say that Congress has the power to tax the illegal activity but does not have the power to require essential information for purposes of record-keeping and enforcement of the tax. The government felt that it was important that certain essential information be provided, but that the Court could restrict the use of that information in any federal, state or local prosecution for similar offenses. The government proposed that the use-restriction be patterned after that found in *Murphy v. Waterfront Commission,*[26] and that such imposition would not constitute a judicial legislation of an immunty statute, but rather a restriction on use.[27] The Court rejected this proposal on the theory that granting immunity is a Congressional function and not one properly belonging to the Court.

It has only been in recent years that the Court has begun to define the areas in which the privilege against self-incrimination will apply. The language of the fifth amendment[28] would suggest that it ought to be applied only in criminal cases; however, its history indicates that it is not to be interpreted literally.[29] The privilege against self-incrimination has been called "one of the great landmarks in man's struggle to make himself civilized."[30] In a spirit of an expansive view of the fifth amendment, the Court in recent years has defined a diversity of activities to which the privilege against self-incrimination will apply. The privilege has been construed to protect the criminally accused from the time the criminal

25 Marchetti v. United States, 390 U.S. 39, 58-60 (1968); Grosso v. United States, 390 U.S. 62, 69 (1968); Haynes v. United States, 390 U.S. 85, 99-100 (1968).

26 378 U.S. 52 (1964).

27 Brief for the United States on Reargument at 33, Marchetti v. United States, 390 U.S. 39 (1968) and Grosso v. United States, 390 U.S. 62 (1968) [hereinafter cited as Brief for United States]; and Brief for the United States at 31, Haynes v. United States, 390 U.S. 85 (1968).

28 U.S. CONST. amend. V: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

29 McKay, *Self-Incrimination and the New Privacy,* 1967 SUP. CT. REV. 193, 194 [hereinafter cited as McKay].

30 E. GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955) [hereinafter cited as GRISWOLD].

process begins to "focus on a particular suspect"[31] or his freedom of movement is impaired.[32] The privilege also requires that, before custodial interrogation may begin, the criminally accused must be informed of his right to counsel, his right to remain silent, and that anything he says may be used against him.[33] It has also been held a violation of the privilege if the defendant fails to take the witness stand in a criminal prosecution and the prosecutor is allowed to comment on that fact.[34]

Besides application of the privilege to criminal cases, it is generally recognized that the privilege applies in all civil cases where the result of the testimony may be incrimination.[35] Today there is a general recognition that the privilege will apply to testimony to be given before an administrative agency,[36] legislative committee,[37] or a grand jury.[38]

In *Malloy v. Hogan*[39] the Court held that the Fourteenth Amendment prohibits state infringement on the privilege against self-incrimination. Thus, the privilege is applicable to the states, and in some recent decisions the Court has found it appropriate to further expand the scope of the privilege by holding: (1) that the privilege applies to situations where the giving of testimony in one jurisdiction under a grant of immunity from prosecution will nonetheless subject the witness to possible prosecution in another jurisdiction;[40] (2) that the privilege will be a bar to the compulsion of testimony in any factual situation where some form of sanction makes "costly" the non-exercise of the privilege.[41]

As the definition of the scope of the privilege has expanded in modern times, the privilege has come into conflict with legitimate government need to acquire and use information to regulate and govern effectively.[42] There has been much discussion, with regard

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31 Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

32 Miranda v. Arizona, 384 U.S. 436 (1966).

33 *Id.* at 479.

34 Griffin v. California, 380 U.S. 609 (1965).

35 McCarthy v. Arndstein, 266 U.S. 34 (1924).

36 ICC v. Brimson, 154 U.S. 447 (1894).

37 Quinn v. United States, 349 U.S. 155 (1955).

38 Reina v. United States, 364 U.S. 507 (1960).

39 378 U.S. 1 (1964).

40 Murphy v. Waterfront Comm'n., 378 U.S. 52 (1964).

41 Spevack v. Klein, 385 U.S. 511 (1967); Garrity v. New Jersey, 385 U.S. 493 (1967); Griffin v. California, 380 U.S. 609 (1965); and the cases that are the subject of this note.

42 Note, *Required Information and the Privilege Against Self-Incrimination*, 65 COLUM. L. REV. 681, 682 (1965). *See also* Brief for United States.

to the *Escobedo* and *Miranda* cases, concerning the Court's view that in an in-custody situation the values that the fifth amendment was designed to protect must be upheld above all else, *i.e.*, above the government's need to obtain evidence to convict the accused. In *Marchetti, Grosso,* and *Haynes* the Court is grappling with the same type of problems that it had to decide in the cases relating to the criminal process. The Court must consider on the one hand the government's need for information, and, on the other, the hazards of incrimination that the registration statutes pose and the values of the fifth amendment that the privilege is designed to protect. Thus a relevant inquiry may be: what do these cases do to past precedent, the present view of the privilege and the possible future course that the Court will take when dealing with fifth amendment problems? Inasmuch as the Court's opinions in *Grosso* and *Haynes* are primarily a reiteration of the position it takes in *Marchetti,* and because those cases rely on *Marchetti* as precedent, the attempt to answer the questions suggested above will be primarily from the effect that the *Marchetti* decision has on precedent and the present view of the fifth amendment, and the effect it is likely to have on the scope of the privilege.

As noted above, the *Marchetti* decision overrules two strong precedents: *United States v. Kahriger*[43] and *Lewis v. United States.*[44] Those cases were almost identical to the factual situation presented by *Marchetti.* In *Kahriger* and *Lewis,* the petitioners made the same fifth amendment self-incrimination claim and in those cases the Court rejected that claim. In *Kahriger* the Court said that the wager tax statutes and the requirement of registration did not present any form of compulsion to the potential registrant. The registrant is not compelled to confess acts already committed; the statute merely sets down particular conditions that must be fulfilled in order to engage in the business.[45] The *Kahriger* Court argued that the privilege applies only to past acts and is not applicable to future acts which may or may not be committed.[46] In *Lewis* the Court could find no compulsion in the tax provisions[47] and went on to say that the statute merely designates a class of people that are liable for the tax if they decide to engage in the activity that is being taxed. The fact that one wishes to engage in the activity which is illegal is his decision.

43 345 U.S. 22 (1953).
44 348 U.S. 419 (1955).
45 345 U.S. at 32-33.
46 *Id.* at 32.
47 348 U.S. at 421.

He is free to do so, but it must be recognized that there is no constitutional right to gamble.[48] The Court was certainly aware of the dilemma in which these decisions placed the gambler[49]—he was damned if he registered and damned if he did not—but it felt that the values of the privilege were outweighed by the competing need for information necessary to enforce the tax provisions.

In *Marchetti* the issue was put in its proper perspective: "the question is not whether petitioner holds a 'right' to violate state law, but whether, having done so, he may be compelled to give evidence against himself."[50] The Court recognized that the privilege protects the guilty as well as the innocent and that there can be no waiver of the privilege by failure to assert it at the time the decision is made on whether or not to register and pay the tax.[51] The Court in *Marchetti* says that the *Kahriger* and *Lewis* decisions represent "too narrow" a view of the privilege. Those decisions failed to account for the hazards of incrimination as to past or present acts, in that by registering one is increasing the likelihood of prosecution. This is especially true in *Grosso;* as pointed out above, in order to pay the tax, the petitioner would also be required to fill out and file the appropriate registration forms. The very fact that the petitioner is paying the excise tax would mean that he has, sometime prior to the tender of the tax money, gambled. Thus, there is definitely incrimination as to past acts in the *Grosso* situation.[52] Beyond this consideration, however, the Court felt that "past-present act doctrine" is in itself "too narrow." The Court sees real and substantial hazards of incrimination in the requirement to register. The increase in the possibility of prosecution is the hazard that the Court sees.

There is no denying that there is a definite need for effective methods of law enforcement to guard against social ills. The fact that all states have some form of statute prohibiting or regulating gambling is indicative of our society's feelings that gambling is not a desirable form of conduct.[53] The tax laws are one method of bringing about effective controls and effective law enforcement. Tax laws, like those in question in *Marchetti, Grosso,* and *Haynes,* are

48 *Id.* at 422-23.

49 Kahriger v. United States, 345 U.S. 22, 36-37 (1953) (Black, J. dissenting opinion).

50 Marchetti v. United States, 390 U.S. 39, 51 (1968).

51 *Id.*

52 McKay 221-22.

53 A list of state gambling statutes may be found in Marchetti v. United States, 390 U.S. 39, 44 n.5 (1968).

a source of information which may be used to check undesirable types of conduct. Besides the check on criminal activity, the information obtained through these statutes may also be used to initiate general probes, harass the registrant, and subject him to exposure and publicity of his criminal conduct.[54] Because the registration requirements can be used to enforce criminal statutes and regulate criminal conduct, there is some doubt that the statutes may properly be called "good faith revenue measures" as the Court does in *Marchetti, Grosso,* and *Haynes.* The purpose of the statute is further thrown in doubt by the fact that it is generally recognized that there is a high enforcement cost for a low yield of revenue.[55] If the taxes are not valid revenue measures,[56] if the primary purpose of the statutes is the regulation of conduct, then the Court should have had an easier time deciding the issues raised by *Marchetti, Grosso,* and *Haynes.*

The Court complicated its problem by assuming that the taxes were valid revenue measures and that implicit in the revenue purpose of the enactments is the gathering of information which the taxpayer is required to file. Because of this recognition of the statutes as revenue measures, the Court was presented with the government's contention that because there is a valid tax purpose, a balance must be struck between that tax purpose and the fifth amendment privilege. It was the government's belief that *Kahriger* and *Lewis* strike a proper balance between the privilege and the power to tax and represent and reflect an accommodation of the competing values.[57]

By holding the privilege applicable to the situation, the Court is moving away from and rejecting the accommodation approach of *Kahriger* and *Lewis.* The Court, in *Marchetti,* is saying that in these situations the scope of the privilege is such that certain values cannot be compromised, accommodated or balanced against Congress' power to tax, the need for information or the social necessity for devices to control crime. The fact that the Court overrules *Kahriger* and *Lewis* in the face of the government's suggestion that those cases represent

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54 Comment, *Self-Incrimination and Registration Statutes: A Case Against Constitutionality,* 4 HOUSTON L. REV. 507, 521 (1966).

55 In Brief for United States, n.17, it is stated that since the enactment of the wagering tax in 1952 until this action in 1966, the total revenue has been approximately 106 million dollars, while the enforcement cost for the same period has been approximately 27 million. *See also* McKay 222-23.

56 Justice Frankfurter's dissenting opinion in Kahriger v. United States, 345 U.S. 22, 37-40 (1953), suggests that they are not.

57 Brief for United States 23-24.

an appropriate accommodation of the privilege values, coupled with the fact that the Court in so doing says that *Kahriger* and *Lewis* represent "too narrow" a view of the scope of the privilege, suggests that it is adopting a more expansive view of the fifth amendment privilege, a view that certain values of the privilege must be put above all other competing values.

Further proof that the Court has moved away from the accommodation notion is reflected in the peculiar part of the opinion where the Court recognizes the statute as a revenue measure. If the purpose of an enactment is something other than the detection and prosecution of crime, the statute is easier to sustain.[58] Valid revenue measures are usually struck down or watered down only when there are strong overriding of competing values. In *Marchetti* there is no discussion of competing values, only a flat statement that the assertion of the privilege is a valid defense. The decision is framed in such a way that the statute is on the books, but the privilege may be properly asserted in any prosecution to enforce the requirements of registration or the payment of the taxes. Thus, the Court has only nominally accommodated the competing values. In actuality there has been a complete emasculation of the statute's effectiveness. It cannot be said that the statutes have any effectiveness in providing information or a means to control criminal activity.

The Court discussed a second form of constitutional accommodation: the required records doctrine as enunciated in *Shapiro v. United States.*[59] The petitioner in *Shapiro* claimed that the statute that allowed the issuance of a subpoena *duces tecum* to require him to produce certain business records, which led to his conviction for violation of the Emergency Price Control Act, violated his constitutional privilege against self-incrimination. The Court held that if private papers are made matters of public record and subject to government inspection by Congressional enactment, then production of the papers is not a violation of the privilege against self-incrimination. The rationale for the decision in *Shapiro,* as in *Kahriger* and *Lewis,* is a recognition that the government has a definite need for information so that it may effectively enforce the regulations that Congress enacts.[60]

58 Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information,* 1966 SUP. CT. REV. 103, 146 [hereinafter cited as Mansfield].

59 335 U.S. 1 (1948).

60 This fact is pointed out to the Court in Brief for United States 7. *See also* McKay 217.

The decision in *Shapiro* has allowed Congress to bypass the privilege in every transactional situation that Congress may deem it appropriate to regulate. Fortunately, agency administrators and Congress have not pushed the doctrine to its logical limit.[61]

In its grant of certiorari in *Marchetti*, the Court indicated its willingness to re-consider and re-evaluate its position on the doctrine and to consider how the doctrine might affect the problems raised in the case.[62] When the court reaches the issue of required records in *Marchetti*, it side-steps the problem by saying that the three essential elements of the doctrine, as described by *Shapiro*, are not present in the case: (1) Marchetti is not obliged to keep records of the type he has customarily kept, (2) there are no public aspects to the records, and (3) unlike the *Shapiro* situation, this is an area that is "permeated with criminal statutes."[63]

It would seem that there are three possible reasons why the Court side-stepped the issue of required records in *Marchetti*. First, the Court was exercising a judicial restraint that is similar to the restraint exercised by the doctrine in *Shapiro*. But here the Court has more reason to exercise restraint because this is an area permeated with criminal statutes and sanctions. The Court is taking a position similar to that of Justice Frankfurter in his dissent in *Shapiro*:[64] in order to determine whether the records are public one must take into account their custody, subject matter and the use to be made of them. The Court recognizes the statutes as valid taxes but also points out that the information can be used to prosecute the registrant for criminal acts. Second, the petitioner and the government suggested to the Court that the doctrine is not applicable. This certainly must have influenced the Court's decision. Third, although the government suggested that the required records doctrine was not applicable, it also pointed out that in an appropriate case there must be some form of accommodation between the government's need for information and the scope of the privilege. The required records doctrine can provide such accommodation. If these statutes are truly a valid exercise of the taxing power and if there is a definite need for information for the enforcement of the statutes, then why would not the Court attempt to squeeze the case into this justification for allowing disclosure in the face of possible incrim-

61 McKay 215.

62 *See* note 5 *supra* setting out the Court's grant of certiorari.

63 Marchetti v. United States, 390 U.S. 39, 47 (1968).

64 335 U.S. at 56.

ination? The Court could easily twist the facts to meet the essential elements of the required records doctrine. By distinguishing *Shapiro* on factual grounds, the Court misses an excellent opportunity to uphold and justify the registration requirement and to follow precedent. Because the Court refused to follow *Shapiro*, and to the extent that the case represents another form of constitutional accommodation, the Court rejects the accommodation approach and finds certain fifth amendment values above accommodation and compromise.

If the statutes were found to violate the privilege against self-incrimination, the government argued in *Marchetti*, *Grosso*, and *Haynes*, instead of holding the registration provisions unconstitutional, the Court should adopt a use-restriction rule:

> . . . the proper remedy would be to limit the use of the information obtained from registration and the filing of an excise tax return to federal tax purposes.
> . . . where there is a clear governmental interest in the information sought, where only a minimal or limited disclosure is required and where the interest in obtaining the information is grounded on a legitimate exercise of a separate and independent governmental power, and not principally a concern with the underlying activity involved, a persuasive case can be made for applying a use-restriction rule like that adopted in *Murphy*.[65,66]

It was the government's contention that such a rule would allow the Court to preserve the taxing power and at the same time retain the essential protection of the privilege.[67] The Government argued that it was not asking the Court to usurp the function of Congress and, in effect, adopt an immunity statute. The government was asking the Court to adopt a rule that where there is a criminal prosecution of a registrant, who has complied with all of the registration requirements, the prosecutor will have to show that the evidence is not tainted by the required disclosure and that the evidence which was the basis of the probable cause to arrest and prosecute the registrant was the product of an independent source.[68]

The general rule is that a grant of immunity from prosecution must be as broad as the protection afforded by the privilege against self-incrimination.[69] Assuming that not all prosecution is prohibited

65 Murphy v. Waterfront Comm'n., 378 U.S. 52 (1964).

66 Brief for United States 26-28.

67 *Id.* at 28-29.

68 *Id.* at 33.

69 Counselman v. Hitchcock, 142 U.S. 547, 585 (1892); *see also* Hale v. Henkel, 201 U.S. 43 (1906); Brown v. Walker, 161 U.S. 591 (1896).

by a use-restriction rule or a grant of immunity,[70] it is difficult to see why the Court rejected the use-restriction proposal. When a use-restriction rule is adopted and prosecution is allowed, the Court will be able to protect the individual by limiting the use of the tainted evidence and requiring the prosecution to prove the evidence is not tainted and is derived from some independent source. All grants of immunity or restriction on use present judicially administratable situations in which the Court can determine whether the protections of the privilege are being extended.

A use-restriction or a grant of immunity is an effective method of accommodating constitutional values. The Court, in rejecting the proposed use-restriction, finds an easy way out in the argument that granting immunity is a Congressional function and solely within Congress' power.

It would seem that the Court's rationale in rejecting the use-restriction proposal may be criticized in three respects. First, as has been pointed out above, the Court's position was that the statutes in question were valid revenue measures. If that is true, then the Court should attempt to uphold those measures if at all possible. By failing to use an accepted accommodation method, *i.e.*, a use-restriction, the Court is not attempting to uphold the statute as valid exercises of the Congressional power to tax. Secondly, the government did not propose the enactment of an immunity statute; the proposal was for a judicially declared use-restriction in the same way the Court declared a use-restriction in *Murphy*. If nothing else, this distinction gave the Court a possible ground for circumventing the objection that such a procedure by the Court would constitute a usurpation of Congressional power. Third, as Mr. Chief Justice Warren points out in his dissent, what seems to be troubling the Court is not the fact that there is a registration requirement, but that the information obtained must be turned over to prosecuting authorities.[71] Chief Justice Warren also points out that Congress

70 There certainly is substantial reason to suggest that an immunity or use-restriction does not impose a total prohibition on prosecution. *Murphy* leaves the question up in the air, but Justice White in his concurring opinion in *Murphy*, 378 U.S. at 107, suggests that the Constitution does not go so far as to require that immunity protect against all prosecutions. Garrity v. New Jersey, 385 U.S. 493 (1967), holds that the privilege "prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office," *id.* at 500, with no further suggestion that all prosecution is prohibited. Thus, it may be assumed that the grant of immunity or a use-restriction does not prohibit all subsequent prosecution.

71 In the principal internal revenue office . . . there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid

intended that any provision that the Court would deem inconstitutional is separable under a separability clause in the Internal Revenue Code.[72] Thus, the argument could be made that it is the operation of section 6107 and the requirement of disclosure of the names and addresses of the registrants that is violative of the privilege and should be severed from the code. Again, however, the Court does not take this approach; rather, it finds that the mere fact of registration is a violation of the privilege.

Thus, the decision in *Marchetti* to overrule *Kahriger* and *Lewis*, to distinguish *Shapiro* and to reject the government proposal for a judicially imposed use-restriction, constitutes the rejection of three acceptable methods of accommodating competing values. In rejecting the accommodation methods, the Court in *Marchetti*, *Grosso*, and *Haynes* holds that there are certain fifth amendment values that are primary and cannot be accommodated. In order to determine what these decisions may mean, one must first attempt to find the basic values the privilege is designed to protect. Having done this, it then becomes proper to ask whether there are certain fifth amendment values that can never be accommodated.

Wigmore suggests twelve reasons or values that are the basis for the privilege.[73] He dismisses ten of the values as not totally relevant in all cases, and concludes:

> The significant purposes of the privilege . . . are two: The first is to remove the right to an answer in the hard cores of instances where compulsion might lead to inhumanity, the principal inhumanity being abusive tactics by a zealous questioner. The second is to comply with the prevailing ethic that the individual is sovereign and that proper rules of battle between government and individual require that the individual not be bothered for less than good reason and not be conscripted by his opponent to defeat himself.[74]

Another source suggests three bases for the privilege: (1) abhorrence of torture and brutality, (2) preventing political and religious oppression and thought control, and (3) protection of the policy of

special taxes. . . . Such lists . . . shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof. . . .

INT. REV. CODE of 1954, § 6107.

72 INT. REV. CODE of 1954, § 7852(a).

73 8 J. WIGMORE, EVIDENCE § 2251, at 310-17 (McNaghton rev. 1961).

74 *Id.*

preventing general probes and protection of personal privacy.[75] Griswold has expressed the values which the privilege protects as a combination of our abhorrence of torture and a recognition of the dignity of the individual. He suggests that the fifth amendment is a symbol of the community's moral sense of justice.[76] One recent writer has suggested that all of the rationales traditionally given as a basis of the privilege are either doubtful or unbelievable and that there are only two basic values that the privilege protects: First, the integrity of the judicial system, by requiring the government to bear the burden of proof, even when prosecuting the guilty; and second, the privacy of the individual.[77]

It is not within the scope of this note to discuss the rightness or wrongness of any of these statements. There can only be a limited reconciliation of all of the diverse statements on what values the privilege is designed to protect. Underlying all of the values suggested, there seems to be an abhorrence of brutality and violence, a feeling that "fairness" requires imposition of the privilege, and, as suggested by some writers, a concern for the privacy of the individual and freedom from governmental intrusion.

Assuming that the above represents a fair synopsis of the underlying values the fifth amendment protects, then the question can again be asked: what is the meaning of the decision in *Marchetti* to reject all of the accommodation approaches to the problem? The privilege against self-incrimination has been viewed as something less than an absolute right; and one of the traditional methods used by the Court to deal with fifth amendment problems is the accommodation of competing values. How could it be said that there is an absolute right in the privilege when historically the privilege has not been viewed as an absolute right and the usual constitutional approach to fifth amendment problems has been through some form of accommodation?

In deciding *Marchetti, Grosso,* and *Haynes,* the Court places strong emphasis on *Albertson v. Subversive Activities Control Board,*[78] which held that a statute which required all members of

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75 *See* Comment, *supra* note 54 at 518-19. The article presents a good synopsis of the history of the privilege and a discussion of the values that the privilege has been thought to protect.

76 GRISWOLD 53.

77 McKay 206-14.

78 382 U.S. 70 (1965). This emphasis can be seen in the Court's grant of certiorari, *see supra* note 5, and the frequent citation of the case in the opinion.

the Communist party to register violated the petitioner's privilege against self-incrimination. There are certainly factual differences between *Albertson* and *Marchetti*,[79] but assuming that the cases are sufficiently similar, the primary inquiry is what does the Court do in *Albertson* that is relevant to the decision in *Marchetti*? In *Albertson* the Court distinguished *United States v. Sullivan*,[80] a case which upheld the requirement that all people fill out and file an income tax return. The *Albertson* Court reasoned that:

> In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities.[81]

The *Marchetti* decision adopts this distinction and says that requiring registration by a gambler places the inquiry in an area permeated with criminal statutes. It might also be noted that *Albertson*, to some extent, is the case that first expresses the view against appoaching fifth amendment problems by the accommodation method. There are certainly strong competing values in *Albertson*—national security and the need for information—but when the Court strikes down the statute requiring registration, there is no discussion of competing values.[82] The Court merely says that the statute violates the privilege against self-incrimination.

The Court's attitude in *Marchetti*, *Grosso*, and *Haynes* may have come also from the approach that it took in *Garrity v. New Jersey*[83] and *Spevack v. Klein*.[84] These cases hold that "if it is costly" or one must "suffer penalty" to assert the privilege, there is no free choice to speak out or remain silent. The Court approached the problem in those cases by saying that regardless of the competing values, if the assertion of the privilege is "costly" it is a form of

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79 Mansfield 157-58, suggests two relevant factual differences. First, after registering in the Marchetti situation, the registrant can still decide whether to gamble or not; in the Communist registration requirement the obligation to register is imposed without regard to whether some future activity is engaged in. Second, it may be easier to find a valid purpose in the *Albertson* registration situation than in the wagering tax cases. On the other hand, the *Albertson* situation has first amendment coloration (suppression of political action and opinion) which strengthens the argument based on the fifth amendment.

80 274 U.S. 259 (1927).

81 Albertson v. Subversive Activities Control Board, 382 U.S. 70, 79 (1965).

82 Not only is there no discussion of competing values, but the Court does not even attempt to distinguish or discuss *Kahriger*, *Lewis*, or *Shapiro*.

83 385 U.S. 493 (1967).

84 385 U.S. 511 (1967).

compulsion that is forbidden by the fifth amendment. Again there is no discussion of competing values.

In *Albertson, Garrity, Spevack,* and *Marchetti* the Court is not attempting to express abhorrence of violence or torture. There is not in any of the factual situations presented by these cases any form of violence, torture or physical contact. Thus, the first suggested value that the privilege is designed to protect may be ruled out in these cases as a basis for the opinions.

To some extent the Court is attempting to uphold the "fairness" value in these cases. This value must necessarily be a major consideration in the Court's decisions. It is not "fair" to force any suspect to incriminate himself or put him in a position that a disclosure may result in a subsequent prosecution. The ironic part of the *Marchetti* decision is that if "fairness" is the value that the Court views the privilege as designed to protect, then why does the Court reject the accommodation methods? The traditional method of determining what is "fair" is by asking the question "considering all of the circumstances, is it fair to require the accused to speak?"[85] Yet the Court does not adopt this line of reasoning in the *Marchetti* case. Thus, it is arguable that "fairness," in the view of the Court, was not the primary value protected by the fifth amendment.

Since the abhorrence of violence and torture has been ruled out as a value, and assuming that rejection of the accommodation approach in *Marchetti* is to be understood as a rejection of the "fairness" value as the basis of the privilege, then it might be properly argued that what the Court is concerned with in *Marchetti, Grosso,* and *Haynes,* and to some extent in *Garrity, Spevack,* and *Albertson,* is the right of the individual to privacy, to be free from general probings and governmental intrusions. This analysis is relevant because the value that we fix as the basis of the privilege will give different results. As an example, assume that the Court is correct in stating that the formulation of a use-restriction is a Congressional function. Because of the holdings in *Marchetti, Grosso,* and *Haynes,* it is fairly certain that Congress, in order to give the statutory system some effectiveness, will impose some form of immunity or use-restriction.[86] Assuming that Congress has already acted in granting

85 The cases in this area are too numerous to mention; generally, it would be appropriate to see the Due Process balancing cases and the coerced confession cases such as Rochin v. California, 342 U.S. 165 (1952) and Schmerber v. California, 384 U.S. 757 (1966).

86 Brief for United States 33-34, states that the Internal Revenue Service has already acted to get some form of Treasury ruling or Congressional amendment of

immunity, the same problems arise: what are the fifth amendment values? If we assume that a grant of immunity must be as broad as the privilege that it displaces,[87] then the problem becomes one of determining the breadth of the privilege. If we say that the basis of the privilege is fairness and if we accept the proposition that one of the traditional methods of determining what is fair is by an accommodation of competing values, then the Congressional grant of immunity presents no problem. The grant of immunity is an accommodation of competing values and all acceptable accommodation methods may be used to insure fairness. Thus, the grant of immunity is as broad as the privilege that it displaces. However, if it is said that the privilege is based on a value of privacy, then a grant of immunity is not as broad as the privilege that it displaces because any disclosure, even where there is immunization from prosecution, is an invasion of privacy.[88] If the value of the privilege is privacy, then a grant of immunity by its very nature is not as broad as the privilege it displaces because disclosure is required under a grant of immunity and disclosure is an invasion of privacy.

The decision in *Marchetti* will probably have two effects in the area of fifth amendment problems. First, because Congress has enacted many statutes which have registration requirements similar to the one the Court finds subject to the defense of the privilege,[89] there is no question that the *Marchetti* decision will be a strong precedent for striking down similar registration requirements.[90] The process has already begun in *Haynes*.

Second, it is highly probable that there will be a Congressional response to the *Marchetti* decision. It is likely that Congress will enact some form of immunity provision or amend the provision

§ 6107 to exclude gambling occupational taxes from the list of taxes subject to public disclosure.

87 Counselman v. Hitchcock, 142 U.S. 547 (1891).

88 An example of this proposition would be the hypothetical situation where Mr. X, a noted university professor in the field of economics, is required to register because he is a communist. Mr. X may be granted an immunity from prosecution, but what has been done to his reputation in the academic community? By requiring disclosure there has been such an invasion of his privacy that a grant of immunity will not protect that privacy.

89 *E.g.*, 18 U.S.C. § 1407 (1964) requires that narcotic addicts who leave or enter the United States register.

90 N.Y. Times, Jan. 30, 1968, at 25, col. 3: "Justice Department lawyers concurred today with his [Chief Justice Warren in dissent] prediction that similar constitutional attacks would be made immediately against Federal laws which require persons to register if they deal in narcotics, marijuana or liquor distillery equipment."

that requires disclosure of the registrant's name.[91] Because the accommodation approach was rejected in *Marchetti*, such legislation would place the Court in a rather delicate position. If the Court rejected the use-restriction proposed by the Government because it felt that the value to be protected is privacy, then, as pointed out above, it cannot, consistently with that value, uphold the grant of immunity as co-extensive with the privilege. On the other hand, if the value is fairness and the Court recognizes that a Congressional grant of immunity is an appropriate method to guarantee fairness, it would be reasonable to ask why the Court did not accept the accommodation approach in the cases that prompted the Congressional action.

If the privacy value is found to be the basis of the privilege, the Court has broadened the scope of the privilege. If this is the situation, then there is emerging something approaching an absolute right in the privilege against self-incrimination, a right that cannot be compromised in the face of competing values. What the Court must do, and what it has failed to do in *Marchetti*, *Grosso*, and *Haynes*, is to give a definition of that value which is at the base of the privilege. These cases do not define that value, but they point in the direction of finding in the fifth amendment protection of the individual's privacy.

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91 INT. REV. CODE of 1954, § 6107.